

THE HIGH COURT

[2022] IEHC 36

Record No. 2012/4571P

BETWEEN:

MICHAEL TREANOR AND MARGARET TREANOR

PLAINTIFFS

-AND-

NUTECH RENEWABLES LIMITED

AND, BY ORDER OF THE COURT OF 14 NOVEMBER, 2016,

MARK FORKIN AND WILLIAM QUIGLEY

DEFENDANTS

-AND-

AND, BY ORDER OF THE COURT OF 3 APRIL, 2017,

COONEY ARCHITECTS LIMITED AND

BRIAN RAFFERTY CONSTRUCTION LIMITED

THIRD PARTIES

Judgment of Mr. Justice Cian Ferriter delivered this 26th day of January 2022

Introduction

1. This is the Defendants' application to have the Plaintiffs' proceedings dismissed either pursuant to Order 122, Rule 11 for failing to progress the proceedings for a period in excess of two years or, in the alternative, pursuant to the inherent jurisdiction of the court on the grounds of inordinate and inexcusable delay in the prosecution of the proceedings. As there was a step taken by the Plaintiffs within 2 years prior to the issue of the dismissal motion (the motion was issued on 26 June 2019 and Plaintiffs delivered Replies to Particulars on 22 January 2018), the parties focused their submissions on the application to dismiss the proceedings pursuant to the court's inherent jurisdiction and this judgment accordingly deals with the application on that basis.
2. The first named Third Party, Cooney Architects Limited, has separately brought its own motion (issued on 11 August 2020) to have the Defendants' third party claims against it dismissed for want of prosecution. I directed at the outset of the hearing of the Defendants' application to dismiss against the Plaintiffs that I would hold over hearing the first named Third Party's application to dismiss against the Defendants until I had ruled on the Defendants' application to dismiss against the Plaintiffs.

Applicable Legal Principles

3. The test applicable on this application is that enunciated in *Primor v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, as subsequently developed. Hamilton C.J. in *Primor v. Stokes Kennedy Crowley* stated as follows (at 475) in relation to the relevant principles:-

'The principles of law relevant to the consideration of the issues raised on this appeal may be summarised as follows: —

- (a) *the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so;*

- (b) *it must, in the first instance, be established by the party seeking dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable;*
- (c) *even where the delay has been both inordinate and inexcusable the court must exercise a judgement on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;*
- (d) *in considering this latter obligation the court is entitled to take into consideration and have regard to:*
 - (i) *the implied constitutional principles of basic fairness of procedures,*
 - (ii) *whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the defendant to allow the action to proceed and to make it just to strike out the plaintiff's action,*
 - (iii) *any delay on the part of the defendant — because litigation is a two-party operation, the conduct of both parties should be looked at,*
 - (iv) *whether any delay or conduct of the defendant amounts to acquiescence on the part of the defendant in the plaintiff's delay,*
 - (v) *the fact that conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case,*
 - (vi) *whether the delay gives rise to substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the defendant,*
 - (vii) *the fact that the prejudice to the defendant referred to in (vi) may arise in many ways and be other than that merely caused by the delay, including damage to the defendant's reputation and business.'*

4. In the decision of the Court of Appeal in *Millerick v. Minister for Finance* [2016] IECA 206, Irvine J. (as she then was) summarised the position as follows:-

*"17. The principles which apply on an application brought to dismiss proceedings for inordinate and inexcusable delay are fully explored in the written submissions that have been delivered by the parties. The most oft cited decision is that of the Supreme Court in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 where guidance is given concerning the proper approach to be adopted by the Court when met with such an application.*

18. The Court is obliged to address its mind to three issues. The first is to decide whether, having regard to the nature of the proceedings and all of the relevant circumstances, the plaintiff's delay is to be considered inordinate. If it is not so satisfied the application must fail. If, on the other hand the Court considers the delay inordinate it must then decide whether that delay can be excused. If the delay can be excused, once again the application must fail. Should the Court conclude that the delay is both inordinate and inexcusable it must not dismiss the proceedings, unless it is also satisfied that the balance of justice would favour such an approach.

19. In considering where the balance of justice lies the Court is entitled to have regard to all of the relevant circumstances pertaining to the proceedings including matters such as delay or acquiescence on part of the defendant and the potential prejudice resulting from the delay."

5. Accordingly, if the court concludes that the delay is both inordinate and inexcusable, it must proceed to consider where the balance of justice lies and in so doing, may take into account a range of factors including the conduct of the parties to the proceedings, the number and complexity of the events and transactions required to be recalled, and any prejudice which the Defendants may suffer arising from the Plaintiff's culpable delay.
6. I will refer to other relevant authorities in their appropriate place in this judgment.

Background

7. The background to the matter is as follows. The Plaintiffs were the developers for a development of 12 houses in Mullan Village, County Monaghan. This development commenced in 2006. The Plaintiffs' claims in these proceedings (which include claims for damages for breach of contract, breach of duty, breach of statutory duty, negligent misstatement and negligent misrepresentation) arise out of an agreement said to have been entered between the Plaintiffs and the first named Defendant in May/June 2006 for the design, commission, supply and installation of a specialist "eco" heating, ventilation and hot water system in the houses in the development. At the time, the second and third named Defendants were carrying on business as "Nutech Consultants" and are sued by the Plaintiffs on the basis of alleged representations made by them at the time of the agreement with the first named Defendant and on the basis that there was a collateral agreement between them and the Plaintiffs.
8. In short, the Plaintiffs say that the system installed by the Defendants failed entirely and had to be replaced with conventional systems causing the Plaintiffs loss and damage which they have laterally quantified as being just under €650,000.
9. The Defendants commenced work on the project in mid-2006, with the first houses being completed in late summer 2007 and sold in December 2007. After the sale of the first two houses in the development, the buyers complained that the systems were ineffective to heat their homes. The Defendants continued working on houses in the development up to April 2008. Six houses had been sold by June 2008. The Defendants were made

aware of the alleged defects and produced their own report on the problem in December 2008. Between December 2008 and July 2009, the Defendants undertook extensive testing and remedial works culminating in a further report of 9 July 2009 whereby additional remediation works were recommended by the Defendants. The Plaintiffs dispensed with the Defendants' further services on 20 July 2009. The Plaintiffs say that thereafter, the specialist systems installed by the Defendants were removed and conventional heating, ventilation and hot water systems were installed in all 12 houses by the Plaintiffs at the Plaintiffs' expense.

Chronology of steps in the proceedings

10. The relevant steps in relation to the proceedings were as follows:-

Date	Event
09/05/12	Proceedings issued against Nutech Renewables Limited (High Court, 2012/4574P); Separate proceedings issued against Mark Forkin and William Quigley as Nutech Consultants (High Court, 2012/4571P)
04/11/13	Both summonses renewed for six months by High Court Order (Peart J.)
07/02/14	First letter of claim served on Nutech Renewables Limited
11/04/14	First proceedings served on Nutech Renewables Limited; Second proceedings served on William Quigley and Mark Forkin t/a Nutech Consultants
22/04/14	Appearances filed by Defendants in both proceedings
24/06/14	Notice of Change of Solicitor by Defendants in both proceedings
18/06/15	Statements of Claim delivered in both proceedings
21/07/15	Letter sent consenting to late delivery of Defences
02/11/15	21 day warning letter sent re delivery of Defences
30/11/15	Plaintiffs issue motions for judgment in default of defence in both proceedings
08/01/16	Defences delivered in both proceedings
01/03/16	Defendants' engineering consultants deliver technical assessment report (prepared without the benefit of a site inspection)
16/03/16	Plaintiffs' solicitors write to Defendants' solicitors to confirm generally that joint inspection will take place
12/05/16	Defendants issue motion to consolidate proceedings and a motion to compel inspection

01/07/16	Plaintiffs' solicitors write to Defendants to identify expert witnesses for the Plaintiffs who may be required to attend the joint inspection
10/08/16	Defendants' solicitors request contact details for Cadogans Engineers (the Plaintiffs' expert)
22/08/16	Plaintiffs' solicitor furnishes Codogans' contact details to Defendants.
Sept 16	Joint inspection takes place with experts on both sides
14/11/16	High Court makes Order consolidating proceedings (on foot of Defendants' application)
15/11/16	Defendants' engineers furnish engineering report which forms basis of Defendants' application to join Brian Rafferty and Cooney Architects to proceedings as third parties
03/04/17	High Court grants Order to Defendants to join Cooney Architects and Brian Rafferty Construction as Third Parties
26/04/17	Third Party Notice issued against Cooney Architects
27/04/17	Third Party Notice served on Cooney Architects and also issued and served on Brian Rafferty Construction
27/04/17	Defendants raise Notice for Particulars on Plaintiffs
19/05/17	28 day warning letter sent by Defendants to Plaintiffs re Notice for Particulars
20/06/17	Plaintiffs' solicitor writes to Defendants' solicitor to say consultation being arranged with counsel and clients to settle Replies to Particulars
26/06/17	Second 28 day warning letter re Replies to Particulars sent by Defendants
28/07/17	Motion to compel Replies to Particulars issued by Defendants
09/11/17	Defendants' solicitor write to Plaintiffs' solicitor without prejudice requesting details as to Plaintiffs' alleged losses
09/11/17	Plaintiffs' solicitor replies in without prejudice letter to Defendants' solicitor advising vouchers for losses claimed in Statement of Claim are being assembled
23/11/17	Plaintiffs' solicitors advise vouching documentation is awaited (without prejudice letter)
22/01/18	Plaintiffs deliver Replies to Particulars to Defendants and Defendants' motion

	struck out on consent
22/01/18	Plaintiffs' solicitor write to Defendants' solicitor without prejudice to advise itemised report of QS vouching quantum of special damages is awaited
05/03/18	Defendants' solicitor writes to Plaintiffs' solicitor without prejudice asking when copy of QS report can be expected
05/03/18	Plaintiffs' solicitor replies by return to say that revised report is awaited and as soon as it is to hand, delivery of particulars will be arranged so that a meeting might be arranged thereafter
06/04/18	Defendants' solicitor follows up in without prejudice letter seeking QS report from Plaintiffs
22/05/18	Defendants' solicitor writes without prejudice by way of further reminder seeking QS report
29/05/18	Plaintiffs' solicitor responds without prejudice indicating he has received data which needs to be discussed in advance of delivery of particulars following which a meeting might be arranged
Nov 18	Revised report of QS received by Plaintiffs' solicitor
22/11/18	Plaintiffs' solicitor telephones Defendants' solicitor to update him on position. He says the call is not returned
07/12/18	Plaintiffs' solicitor again telephones Defendants' solicitor and asked to speak to him seeking to update him on position. Plaintiffs' solicitor says call is not returned
30/04/19	Plaintiffs' solicitor receives workings from QS
26/06/19	Defendants issue motion to dismiss returnable for 21 December, 2019
05/07/19	Plaintiffs furnish QS report and workings to Defendants by open letter
08/07/19	Plaintiffs file Notice of Intention to Proceed
13/05/20	Plaintiffs serve Notice of Trial
27/05/20	Plaintiffs serve Notice to Produce
13/05/20	Plaintiffs solicitor proposes QSs liaise to prepare Scott Schedule
03/07/20	Defendants' solicitor writes re requirement of expert report to ground professional negligence claim and seeks details of experts engaged by

	Plaintiffs
11/08/20	Cooney Architects (Third Party) issue motion to dismiss Defendants' third party proceedings for want of prosecution
14/01/21	Defendants serve Third Party Statement of Claim

Parties' submissions

11. The Defendants submit that there are various tranches of inordinate and inexcusable delay on the part of the Plaintiffs, as follows:
 - (i) prior to the commencement of the proceedings in the period from July 2009 to May 2012 (two years 10 months);
 - (ii) post the commencement of the proceedings on 9 May, 2012 until the proceedings were served on 11 April, 2014 (almost two years);
 - (iii) the period from the Entry of Appearances on 22 April, 2014 to the service of Statements of Claim on 18 June, 2015 (9 months);
 - (iv) the period between the Defendants raising a Notice for Particulars on 27 April, 2017 and those particulars being replied to on 22 January, 2018 (9 months);
 - (v) the period from replies to particulars being delivered in January 2018 to this dismissal motion being issued in June 2019 (17 months).

12. The Defendants say that, cumulatively, the picture that emerges is one of the Plaintiffs dragging their heels and being compelled by threat of motion or actual issue of motion to take steps at every relevant stage in the proceedings. They submit that individually and cumulatively, there are long periods of delay which are both inordinate and inexcusable.

13. The Defendants submit that the balance of justice manifestly favours the dismissal of the proceedings at this point and invoke a number of headings of prejudice said to result from the delay including prejudice as to the availability of a number of named witnesses and prejudice in respect of the Defendants' insurance position. The Defendants also contend that the fact that these proceedings are still not disposed of stands to have a potential negative effect on new projects which the first named Defendant intends to commence in the near future to coincide with the coming into effect of the "*near to zero building*" regulations.

14. The Plaintiffs, while accepting that there has been a reasonable lapse of time at various stages both prior to and after the commencement of the proceedings, submit that any lapse of time is excusable. In so far as the Court may take the view that any period or periods of time cumulatively may not be excusable and are inordinate, they submit that the balance of justice favours the Plaintiffs being permitted to maintain the proceedings. They emphasise in this regard that a Notice of Trial has been served, that no discovery is being sought (in circumstances where all relevant material has been accumulated with the

assistance of their experts) and that counsel is in a position to immediately proceed to certify the case as ready for trial and to seek a trial date in the event the Court does not accede to the Defendants' application.

Analysis

Delay: Inordinate and Inexcusable?

15. There is no doubt but that the overall lapse of time in this case is inordinate; it is over 13 years since the events the subject matter of the proceedings occurred and almost 10 years since the proceedings were instituted. The real question that arises is whether the delay is excusable and, if not (whether in whole or in part), whether the balance of justice favours dismissal of the proceedings.

16. I will deal with each of the periods of alleged inexcusable delay on the part of the Plaintiffs in turn.

(i) July 2006 to July 2009

17. In respect of this period, which is pre-commencement of the proceedings, the Defendants submit that it was only on receipt of the Defendants' final remediation report of 9 July, 2009 that it became apparent that the Defendants would not be in a position to remedy the defects and make the systems work. (It will be recalled that the Plaintiffs finally dispensed with the services of the Defendants on 20 July, 2009.) I accept that this is an excusable reason for not issuing proceedings in that period.

(ii) July 2009 to May 2012

18. In relation to the next alleged tranche of delay, that being the period between 20 July, 2009 and 9 May, 2012, the Plaintiffs submit that "*this period was taken up by practical matters, namely the extensive works on the ground to remediate the faulty systems installed at the direction of the Defendants. The boilers, ventilation and hot water systems had to be replaced in 12 houses and the houses made good. This work was undertaken by the first Plaintiff personally (he is himself an electrician) and his agents*". While this information was not contained in the Plaintiffs' replying affidavit, the Defendants submit that even if accepted as factually correct, it does not provide an answer as to why proceedings were not issued. In my view, the Defendants are correct in that regard.

19. However, the Plaintiffs also submit that this period was used to gather evidence necessary for the litigation and that the Plaintiffs engaged Cadogans Engineers (Glasgow) in February 2011 and that they wrote to Sustainable Energy Ireland (SEI) in August 2011 to take up relevant files and that they received a preliminary report from Cadogans in February 2012 on the basis of which it was possible to draft Plenary Summonses. The Plaintiffs (in their written submissions) submitted that resources were an issue at this time in terms of the speed with which they could prepare their case. The Plaintiffs say that their livelihood was concerned with the building trade and that the recession had caused them hardship.

20. While a reasonable period could be allowed to personal plaintiffs in the position of the Plaintiffs at that time to assemble information and engage with experts and get advice

from experts, in my view, a period of 18 months to engage experts (i.e. from July 2009 to February 2011) is excessive and is not fully excusable. Given that the clock was ticking, it was incumbent on the Plaintiffs to act with more expedition in this period. Allowing for some reasonable period to identify, approach and engage appropriate experts, in my view, there was inexcusable delay of some 12 months in this period.

(iii) May 2012 to April 2014

21. As regards the lapse of time between the issue of proceedings on 9 May, 2012 and the service of proceedings on 11 April, 2014 (just under 2 years), the Plaintiffs submit that this lapse of time was excusable in circumstances where they continued to gather evidence with further information being furnished by Cooney Architects in July 2012, additional materials coming to hand in August 2012 and these materials being forwarded to their experts, Cadogans, for analysis. They rely on the fact that on 4 November, 2013, Peart J. renewed the summonses in each case on the basis that, as allegations of professional negligence were involved, it would have been wrong to serve them prematurely while evidence of negligence and breach of contract was still being gathered.
22. In my view, again, while the reasons advanced by the Plaintiffs provide an excusable basis for some reasonable lapse of time, there is not a full excuse provided for why it took from August 2012 (when additional materials were forwarded to the Plaintiffs' experts) to February 2014 (the date of service of the claim letter) and thereafter until 11 April, 2014 (the date of service) to materially advance the proceedings.
23. While it is difficult to estimate the precise period of inexcusable delay within this overall period, I believe that it is reasonable to assess inexcusable delay in the region of some 9 months in this period.

(iv) April 2014 to April 2017

24. As regards the post-service period from 11 April, 2014 to the raising of Notice for Particulars on 27 April, 2017, it is appropriate to break this tranche of time into a number of sub-periods, as follows.

(a) 24 April 2014 to 18 June 2015

25. In my view, the period of some 14 months to deliver a Statement of Claim following the (timely) entry of Appearances on 24 April 2014 was excessive and no good excuse has been given for why the entirety of such a lengthy period was required to deliver the Statement of Claim which was not delivered until 18 June 2015. Again, while it is difficult to estimate the precise period of inexcusable delay within this overall period, in my view it is reasonable to assess inexcusable delay in the region of some 9 months in this period.

(b) June 2015 to January 2016

26. There was no excusable delay in this period. It will be relevant to an assessment of the balance of justice that the Defendants were themselves guilty of some delay in this period, the Plaintiffs being forced to issue motions for judgment in default of defence in November 2015 to get Defences from the Defendants (which Defences were delivered in January 2016).

(c) January 2016 to April 2017

27. I am satisfied that there was appropriate prosecution of the proceedings by the Plaintiffs post-delivery of Defences (i.e. January 2016 to April 2017) in relation to engagement and the question of joint inspections; the period during which the Defendants' motion to consolidate the proceedings was addressed; while the Defendants' motion for consolidation of the proceedings issued on 12 May, 2016 also sought relief compelling inspection, there was reasonably prompt engagement by the Plaintiffs' solicitors with that aspect of the matter thereafter. The period from November 2016 to April 2017 was reasonably taken up with the Defendants advancing the question of the issue and service of Third Party Notices against Brian Rafferty Construction and Cooney Architects.

28. In summary, I assess the total period of inexcusable delay in the period April 2014 to April 2017 as being 9 months.

(v) April 2017 to January 2018

29. The Defendants then raised a Notice for Particulars on 27 April, 2017. These were not replied to until 22 January, 2018. While the Defendants complain that the Plaintiffs were dilatory in dealing with this request, I do take into account the fact that there was engagement between the parties initiating in early November 2007 when the Defendants' solicitors wrote to the Plaintiffs' solicitors (without prejudice) requesting details of the Plaintiffs' alleged losses. In the circumstances, while it would have been preferable for the Plaintiffs' Replies to Particulars to have been furnished at an earlier point, I accept that there was reasonable work required in respect of that exercise and I believe sufficient excusable reasons have been advanced to explain this lapse of time.

(vi) January 2018 to June 2019

30. It seems clear that the Plaintiffs' solicitors believed it appropriate to engage in exchanges with the Defendants' solicitors in the period from end January 2018 to end May 2018 in respect of requests for details of losses and the relevant without prejudice communications (which were ultimately before the Court without objection) made clear that the Plaintiffs anticipated that a meeting might be arranged in relation to the matter. While this may have been in the nature of "*talks about talks*" as the Defendants' counsel fairly put it, in my view, it did provide a reasonable explanation for this lapse of time.

31. I note in this regard that the Plaintiffs' solicitor says that he made contact in late November 2018 and again in early December 2018 to update the Defendants' solicitor on the position. However, the Defendants at this point had had, despite repeated promises from the Plaintiffs' solicitor, not received the Plaintiffs' quantity surveyor report. In the circumstances, I do not believe that fault can be laid at the door of the Defendants in respect of this period.

(vii) June 2019 and subsequently

32. The Defendants issued their motion to dismiss on 26 June, 2019. I do not believe that the lapse of time since then should be taken into account on this application.

33. I note that the Plaintiffs did seek to use this time to get their house in order to the extent that a Notice of Intention to Proceed was filed on 8 July, 2019, a Notice of Trial was

served on 13 May, 2020 and a Notice to Produce was served on 27 May, 2020. The Defendants also used this time constructively to advance their third party proceedings, serving a Third Party Statement of Claim on the Third Parties on 14 January, 2021. The Plaintiffs' solicitor also furnished the Defendants' solicitor with the quantity surveyor's report (prepared by FJD Surveyors Limited on 8 July, 2019). On 27 May, 2020, the Plaintiffs' solicitor wrote to the Defendants' solicitor requesting that the quantity surveyors retained by both sides liaise with a view to the preparation of a Scott Schedule.

Conclusion on Inexcusable delay

34. In conclusion, I have estimated that there were accumulated periods of inexcusable delay of a total of some 30 months in the relevant periods of time. In my view, this period it is also to be regarded as inordinate.

Balance of Justice

35. In light of my conclusion that there have been periods of both inordinate and inexcusable delay, it is necessary to consider whether the balance of justice favours the dismissal of the proceedings.

36. The Defendants relied on the decision of Barrett J. in *Mulligan v. Wylkie & Flanagan, Solicitors* [2019] IEHC 289 as being an authority very close to the facts of this case where the Court ordered the action to be dismissed for want of prosecution. However, in my view, the facts of that case are readily distinguishable. In that case, it appears that in addition to pre-commencement delay of between 5 and 6 years, there were four periods of inordinate and inexcusable delay post-commencement of proceedings in that case amounting to some further 5 or 6 years. There was nothing like the same degree of inordinate and inexcusable delay on the facts of this case. In truth, and as repeatedly emphasised in the authorities, each case involving an application to dismiss has to be assessed on its own particular facts in light of the established legal principles.

37. In assessing the balance of justice, I accept that there is some degree of prejudice occasioned to the Defendants by the periods of inexcusable delay in these proceedings. I am not persuaded that there is material prejudice occasioned to the Defendants in terms of absence of potentially relevant witnesses. While the Defendants in their affidavit grounding this application sought to identify some five witnesses, who they said would be no longer available to them, when the Plaintiffs challenged that in their replying affidavit asserting that none of the identified witnesses were, in fact, involved in the project in question, this was not the subject of any refuting replying affidavit. Accordingly, there was no *prime facie* basis to suppose that the absence of these witnesses was going to cause material difficulty to the Defendants' ability to defend the matter at trial (unlike, e.g., a dead or missing witness who carried out material work on the project or otherwise had a key role in the issues the subject of the action).

38. The Defendants did assert that the systems in issue in the proceedings were niche systems in respect of which there was not much expertise available and that the identified witnesses had such expertise. However, it would appear that the Defendants have engaged experts to assist them and the question of expertise will presumably involve an

independent review of such records as exist in relation to the systems in fact put in place. Insofar as the Defendants complain that as the relevant installed systems were removed by 2009 and there is nothing left for their experts to now assess, it seems to me that that is a problem which existed from 2009 and is not attributed to any delay as such. I have held that there is no culpable delay in the period up to July 2009 and it is clear from the authorities that prejudice relevant to the balance of justice must stem from culpable delay, e.g. *Connolly Red Mills v. Torc Grain and Feed* [2015] IECA 280, Irvine J. (as she then was) at paragraph 44.

39. As regards the prejudice alleged to be suffered by the Defendants in relation to their insurance position, I note that the evidence in the grounding affidavit before the Court was to the effect that the Defendants apprehended such potential adverse defects notwithstanding that their insurance policy had yet to be loaded (it being averred that *"the Defendants had been unable to shop around for more competitive insurance quotes. Whilst their current insurance provider has not loaded the policy, the disclosure of the within claim to any potential new insurance provider would not be advantageous to securing a more competitive rate"*.) I accept that the fact that the proceedings are still ongoing, may remit in some degree of prejudice to their insurance position, and also to their general business position albeit in my view the Defendants' evidence in this regard was at quite a generalised level.
40. I also accept that some degree of prejudice is likely to flow from the fact that it is now between 12 and 15 years since the events in issue in the proceedings have taken place; the greater the lapse of time between events in question (even where reasonable documentation is available) and a contested trial in relation to same, the greater the risk of some prejudice being occasioned.
41. As against those matters, I believe it is necessary to weigh the fact that the Plaintiffs are now ready to set the matter down for hearing. The Defendants have conducted a site inspection and have engaged and had access to experts to assist their defence of the claim. It is not suggested that relevant documentation is no longer available. It appears that the case may largely resolve to key questions of expert evidence and I do not see that the Defendants are any worse off on that score than they would have been if the proceedings had been instituted at some earlier point after July 2009. I do believe it is also relevant to weigh in the scales of justice that there was some without prejudice engagement between the parties (even while accepting that the precise characterisation of that engagement is disputed) and that the Defendants were themselves guilty of some delay in delivery of their Defences.
42. I also take into account the gravity of the consequences of a decision to dismiss by the Plaintiffs; €650,000 is a substantial amount of loss.
43. It is also material to take into account that this motion issued at a time when the proceedings were virtually ready for hearing and can now proceed to be certified and to get as early a trial date as can be accommodated.

44. The Defendants laid particular emphasis in their written submissions in support of this application on the contention that the case against the second and third named Defendants was unstateable. However, it is not the role of the court on an application to dismiss for want of prosecution to express any view on the strength or otherwise of the parties' cases. The Defendants will, of course, remain free to bring any such application as they fit at the trial arising from the alleged unstateability or infirmity of the Plaintiff's case against any of the Defendants.
45. In all the circumstances, in my view, the balance of justice – just about – favours not dismissing these proceedings in circumstances where they appear virtually ready for trial and where I am not satisfied that the prejudice to the Defendants flowing from any periods of inexcusable delay on the part of the Plaintiffs is of a degree as to likely imperil a fair trial of the issues or to outweigh the Plaintiff's right to pursue to trial their claims for compensation for significant loss said to have been occasioned to them by the Defendants' wrongdoing.
46. I should say that it is important to emphasise that no further delay on the Plaintiffs' part should be tolerated in this matter and that it behoves the parties to get this action on for trial as soon as is practicably possible.

Conclusion

47. In the circumstances, I will refuse the relief sought.